STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 26, 2014
v	No. 306602 Oakland Circuit Court
SHAWN LARALE BRYANT, Defendant-Appellant.	LC No. 10-234524-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v	No. 318765 Oakland Circuit Court
SHAWN LARALE BRYANT, Defendant-Appellee.	LC No. 10-234524-FH

Before: JANSEN, P.J., and MURRAY and BOONSTRA, JJ.

PER CURIAM.

In Docket No. 306602, defendant appeals as of right his jury trial convictions of two counts of possession with the intent to deliver 50 to 449 grams of narcotics (one count for heroin, and one count for cocaine), MCL 333.7401(2)(a)(*iii*), and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Following the jury trial, defendant pleaded guilty to another count of felony-firearm, and to a count of felon in possession of a firearm (felon in possession), MCL 750.224f. The trial court sentenced defendant to 15 to 30 years' imprisonment for each of the possession with intent to deliver narcotics convictions, two years' imprisonment for each of the felony-firearm convictions, and 15 to 30 years' imprisonment for the felon in possession conviction, as a fourth habitual offender, MCL 769.12.

After the case was scheduled for arguments, this Court granted defendant's motion to remand so that he could file a motion for a new trial, and then adjourned the case. On remand, the trial court entered an order granting defendant a new trial based on newly discovered evidence. In Docket No. 318765, the prosecution appeals by leave granted from that order.

After consolidating these cases, we now affirm defendant's convictions and reverse the trial court's decision to grant defendant a new trial.

I. BASIC FACTS AND PROCEEDINGS

The facts leading to the convictions arose out of a raid conducted on October 29, 2009, at about 7:30 p.m., when the Oakland County Narcotics Enforcement Team (Team) executed a search warrant for apartments 13 and 21 at Maynard Court in Pontiac. Defendant was the target of the investigation that resulted in the warrants because on that day, and the day prior, Detective Marc Ferguson saw defendant at apartment 13 and the Team conducted two controlled buys from defendant.

About a minute or two before, the rest of the Team entered the front door of apartment 13, Officer Jeff Fletemier and Sergeant Brent Miles went to the back of the apartment building to watch the rear exterior of apartment 13. The back of apartment 13 had a shared balcony with apartment 15 next door. Below the balcony were a concrete patio and a grassy yard. The balcony had a three to four foot high dividing wall that separated apartment 13's side of the balcony from apartment 15's side of the balcony. Officer Fletemier and Sergeant Miles looked around the area before they decided the best position to watch the back door leading out of apartment 13 onto the balcony. At this time, they did not see any contraband on the patio or in the yard. Officer Fletemier was standing in the yard about 10 feet from the balcony while Sergeant Miles was standing about five feet away from the balcony.

While the rest of the team was entering apartment 13 through the open front door,[1] Officer Fletemier and Sergeant Miles saw defendant open apartment 13's back door. Defendant stepped outside onto the balcony. The lights were on in the apartment and Officer Fletemier had his flashlight focused on the back door. Officer Fletemier and Sergeant Miles both shouted for defendant to stop and put up his hands. Instead, defendant raised his right arm and tossed a gun over the side balcony wall to the concrete patio below. In particular, although Officer Fletemier could not identify the object that defendant threw as a gun at the time defendant threw it, he did describe it as a "silver object" that made "a loud metal noise" when it hit the concrete patio. Sergeant Miles identified the object thrown as a gun;[2] however, he could not identify defendant as the person on the balcony.

Defendant subsequently tossed two packages of heroin, and then ducked down beneath the balcony wall. The officers lost sight of defendant for a bit, but then saw defendant roll or jump over the dividing wall onto apartment 15's side of the balcony. Defendant popped his head up over the balcony wall several times.

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[1] Defendant's brother, Freeman Shelton, was exiting as the officers approached. After Shelton attempted to flee, the officers arrested him.

[2] Indeed, Sergeant Miles thought that he might have to shoot the person on the balcony because the person was holding a gun.

Officer Fletemier and Sergeant Miles called Detective Ferguson to inform him about defendant's presence on the balcony. Detective Ferguson and Sergeant Giolitti came from the inside of the apartment to the balcony, hopped over the dividing wall, and arrested defendant on apartment 15's side of the balcony. Detective Ferguson found $3,600 in defendant's pocket. Officer Fletemier and Sergeant Miles then searched the area below the balcony and discovered a .45 caliber, loaded silver handgun. Within a couple of feet of the gun the officers located a broken open bag with a chunk of heroin in it and, in the yard just off the patio another chunk of heroin.

With the help of several other officers, Sergeant Miles and Detective Ferguson searched apartment 13. In the living room, the officers found about nine grams of heroin, three grams of marijuana, a digital scale, three cell phones (one of which defendant allegedly[3] identified as his own cell phone), several pictures[4] of defendant, and defendant's car keys[5] on a table. On the kitchen table there was approximately 47 grams of crack cocaine, 21 grams of heroin, 70 grams of powder cocaine, seven grams of marijuana, a digital scale, cutting agents, packaging materials, cash, and four cell phones.

Based on this and the other testimony and evidence produced at trial, defendant was convicted as set forth earlier. The trial court thereafter denied defendant's subsequent motion to dismiss on the basis that his right to a speedy trial was violated.

Following defendant's filing of a claim of appeal in Docket No. 306602, defendant filed a motion to remand with this Court. Defendant argued that there was newly discovered evidence that Detective Ferguson was involved in misconduct that could call into question his credibility. He requested the Court remand to the trial court in order to allow him to file motions regarding the newly discovered evidence. The prosecution argued, amongst other things, that the evidence did not constitute newly discovered evidence as it would be cumulative and would not make a different result probable on retrial. This Court (1) granted the motion to remand to allow defendant to move for a new trial and conduct discovery, (2) adjourned the case from case call, and (3) retained jurisdiction. *People v Bryant*, unpublished order of the Court of Appeals, entered February 12, 2013 (Docket No. 306602).

In his motion for a new trial, and a subsequent renewed motion filed after some discovery occurred, defendant argued that newly discovered evidence would show that Detective Ferguson lied under oath in an affidavit in support of a search warrant in another unrelated drug case, which occurred prior to defendant's trial. Specifically, defendant argued that a jury would view Detective Ferguson's testimony, and the testimony of his associates, differently if it knew he lied

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[3] Defendant claims that this cell phone was in his pocket.

[4] Defendant testified that these photographs were probably in his car, not apartment 13. He also denied having seen the photographs before the raid.

[5] The car keys matched a car parked in the parking lot of the apartment building. Inside the car, the officers found mail addressed to defendant at 70 East Chicago, Pontiac, Michigan, which was not the address of apartment 13.

under oath in the earlier *Payan* case.[6] Defendant further argued that, at an evidentiary hearing, there would be evidence that (1) there were no notes showing that a controlled buy took place, and (2) no controlled buy occurred.

The trial court granted defendant's motion for a new trial. The trial court made several factual findings and concluded that the evidence was newly discovered, not cumulative, could not have been discovered and produced at trial, and would make a different result probable on retrial. The trial court vacated defendant's convictions and sentences.

We now turn to the appeals.

II. DEFENDANT'S CHALLENGE TO HIS CONVICTIONS

We first turn to the plethora of arguments raised by defendant in his attempt to have his convictions overturned. As detailed below, none of his arguments proves successful.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that his trial counsel provided him with ineffective assistance of counsel. "The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law." *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012). This Court reviews the trial court's factual findings for clear error, and its constitutional determinations de novo. *Id.*

> To establish an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. [*Id.* at 187.]

A defendant must also establish that the proceedings were fundamentally unfair or unreliable. *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.*

> Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases. There is therefore a strong presumption of effective counsel when it comes to issues of trial strategy. We will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. [*People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).]

Finally, counsel is not required to argue a meritless position or raise a futile objection. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

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[6] *People v Payan*, Oakland Circuit Court No. 2012-240090-FH.

FAILURE TO OBJECT

Defense counsel's failure to *further* object[7] to Officer Fletemier's testimony regarding the gun and Sergeant Miles's testimony regarding the heroin did not fall below an objectively reasonable standard. Officer Fletemier's and Officer Miles's testimony was admissible pursuant to MRE 602. MRE 602 states, in relevant part, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony."

There was sufficient evidence showing that Officer Fletemier and Sergeant Miles had personal knowledge of the events that occurred on the balcony. Officer Fletemier and Sergeant Miles were both present and watched defendant walk out of apartment 13 onto the balcony during the search. Officer Fletemier saw defendant toss a silver item over the balcony, and it made a metallic sound upon hitting the cement patio. Sergeant Miles identified this object as a gun. Later, Officer Fletemier and Sergeant Miles recovered a gun from the patio area. Similarly, Sergeant Miles saw the man on the balcony toss several items over the edge. Later, Sergeant Miles and Officer Fletemier recovered two chunks of heroin from the patio. Sergeant Miles saw and positively identified defendant after he was arrested on the balcony. Any further objection by defense counsel would likely have been futile and, therefore, unnecessary. *Ericksen*, 288 Mich App at 201.

Moving to the next issue, defense counsel's failure to object to Sergeant Miles's testimony that he found a card addressed to "gangster Bryant" did not fall below an objectively reasonable standard. MRE 404(a)(1) provides that character evidence of the accused is not admissible "for the purpose of proving that he acted in conformity therewith on a particular occasion" unless defendant offers evidence of his character trait first. However, the prosecution likely offered Sergeant Miles's testimony about a card addressed to "gangster Bryant" to show that the car keys found in apartment 13 belonged to defendant, not to show propensity. Therefore, the trial court would have likely overruled any objection defense counsel raised on this ground. *Ericksen*, 288 Mich App at 201. It is also quite possible that defense counsel chose not to object for strategic reasons. "[T]here are times when it is better not to object and draw attention to an improper comment." *People v Horn*, 279 Mich App 31, 40; 755 NW2d 212 (2008), quoting *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). A singular mention of a rather innocuous nickname is likely one of those times.

We also reject defendant's argument that defense counsel should have objected to the prosecutor's mention of the Casey Anthony trial in his opening statement, the prosecutor's comment in his closing argument about defendant's burden to show that the prosecution's witnesses were lying, and Detective Ferguson's testimony about what two eyewitnesses saw during the search. While the prosecution's comments during opening statements and closing arguments may have been improper, as we explain later in this opinion, the trial court's jury

[7] Defense counsel objected to Officer Fletemier's testimony on hearsay grounds. On appeal defendant argues that defense counsel should have objected on MRE 602 grounds.

instructions corrected any potential confusion and the trial court properly admitted Detective Ferguson's testimony. Therefore, an objection to the prosecutor's statements would have had little or no effect on the trial.

EXAMINATION OF THE WITNESS

Defendant argues that defense counsel should have presented an argument to counter the prosecution's objection to the testimony of defendant's wife, Rayven Rochelle Bryant, about how defendant earned a living. However, even if this failure fell below an objectively reasonable standard, it was not outcome-determinative error. Defendant and Rayven were able to offer several explanations why defendant had $3,600 in his pocket at the time of his arrest, as they both testified that defendant went used car shopping before arriving at the apartment building. Additionally, defendant testified that he worked as a party planner and promoter where he earned large sums of cash, and Rayven explicitly testified that defendant did not earn money by selling drugs.[8]

GUILTY PLEA

Defense counsel's recommendation that defendant plead guilty to one of the counts of felony-firearm and the felon in possession count, rather than have a bench trial, did not constitute ineffective assistance of counsel. First, contrary to defendant's argument, his plea did not further impair his credibility with the trial judge before sentencing, as the trial judge expressed at sentencing that he did not "think the jury got it wrong." What probably hurt defendant more was the fact that the court knew that defendant had previously been convicted of two drug-related offenses, and it had heard defendant testify that he would not sell heroin because of his sister's addiction, all the while knowing that defendant had twice sold heroin to an undercover police officer within 48 hours of the search.

Second, even if defense counsel's recommendation for defendant to plead guilty fell below an objectively reasonable standard, it was not outcome-determinative error. Insisting on a bench trial would not have changed defendant's trial or appellate rights in any significant way.

B. PROSECUTORIAL MISCONDUCT

Next, we reject defendant's argument that the prosecution committed misconduct. This Court reviews de novo preserved issues of prosecutorial misconduct to determine if the prosecutor's statements denied defendant a fair and impartial trial, *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010), while unpreserved issues of prosecutor misconduct are

[8] Defense counsel's performance at sentencing did not fall below an objectively reasonable standard. Contrary to defendant's assertion, defense counsel *did* argue for a lenient sentence on behalf of defendant. Indeed, defense counsel submitted to the trial court a sentencing memorandum (and several letters) that mentioned defendant's education, service to the community, and support of his wife and three children.

reviewed for plain error affecting the defendant's substantial rights, *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010).

Generally, prosecutors are "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Mann*, 288 Mich App 114, 120; 792 NW2d 53 (2010). A prosecutor compromises a defendant's right to a fair trial when he "interjects issues broader than the guilt or innocence of the accused." *People v Rice*, 235 Mich App 429, 438; 597 NW2d 843 (1999). This Court must read a prosecutor's statements as a whole, and evaluate the statements in light of the evidence presented at trial and the defendant's argument. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). A prosecutor may argue the evidence and all reasonable inferences arising from the evidence but may not make any statements of fact to the jury that are unsupported by the evidence. *People v Unger*, 278 Mich App 210, 237, 241; 749 NW2d 272 (2008).

CASEY ANTHONY COMMENT

One important part of our review is to determine if "potentially inflammatory references are intentionally injected, with no apparent justification except to arouse prejudice." *Bahoda*, 448 Mich at 266 (referencing a prosecutor's racist remarks). In conducting this review, "this Court [must] examine[] the remarks in context to determine whether they denied defendant a fair trial." *Id.* at 266-267.

Assuming the prosecution's mention of the Casey Anthony trial during voir dire was improper, it did not deny defendant a fair and impartial trial. First, the prosecutor mentioned the Anthony case only one time, at the beginning of the proceedings. Despite the trial court's ruling in the prosecutor's favor, he did not mention the Anthony case again. This single mention, by itself, could not have had such an influence on the jury that it compromised the fairness and impartiality of defendant's trial.

Second, defense counsel, acting in the best interests of his client, presumably would have removed any juror that he believed was prejudiced by the prosecutor's statement. Defense counsel was aware of the potential bias because he objected to the statement, and he took the opportunity to question the jury on the topic to ensure that none of the jurors would consider the Anthony case.

Finally, the trial court instructed the jury that it was only to consider properly admitted evidence and that the lawyers' statements during trial were not evidence. Courts presume that jurors follow their instructions. *People v Breidenbach*, 489 Mich 1, 13; 798 NW2d 738 (2011). Therefore, the jury should not have considered any potentially improper statements by the prosecutor.

BURDEN OF PROOF COMMENT

"A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *Fyda*, 288 Mich App at 463-464. On the other hand:

> [W]here a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [*People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995).]

Similarly, this Court has held that "attacking the credibility of a theory advanced by a defendant does not shift the burden of proof." *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005).

In context, it appears that the prosecutor's comment that the jury needed to affirmatively decide that two testifying officers were lying was meant to comment on the validity of defendant's alternative version of events. Defendant testified that he happened to be outside on apartment 15's balcony smoking a cigarette when the officers entered apartment 13. According to defendant, the men that were in apartment 13 ran to the balcony, threw the gun and heroin over the edge, and escaped detection by running to a wooded area. The prosecution was permissibly commenting on the unlikelihood of defendant's version of events.

Additionally, twice during his closing argument the prosecutor stated that he had the burden to prove defendant's guilt beyond a reasonable doubt. Similarly, in defendant's closing argument, defense counsel reminded the jury that it was the prosecutor's burden to prove defendant's guilt beyond a reasonable doubt.

Finally, although defendant discounts the trial court's authority, the trial court repeatedly instructed the jurors that they were to presume that defendant was innocent until they were satisfied, beyond a reasonable doubt, of defendant's guilt on each element of the offenses. The trial court further instructed the jury that defendant was not required to prove his innocence. Therefore, the trial court cured any error through its instructions.[9]

C. SPEEDY TRIAL

Defendant also argues that the trial court denied him the right to a speedy trial. As we have stated,

[9] Defendant argues that the trial court erred by failing to instruct the jury on mere presence, and that his trial counsel provided ineffective assistance of counsel by failing to insist on the instruction. The problem with this argument is that the trial court *did* instruct the jury on mere presence, a fact that defense counsel admitted at the hearing on defendant's motion for a new trial. Additionally, although defendant repeatedly states that the trial court did not allow his expert to reference his "notes," the trial court did allow defendant's expert to refresh his memory with his notes on direct examination.

> The determination whether a defendant was denied a speedy trial is a mixed question of fact and law. The factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to review de novo. [*People v Waclawski*, 286 Mich App 634, 664; 780 NW2d 321 (2009) (citations omitted).]

The United States and Michigan Constitutions, and MCL 768.1, guarantee a criminal defendant the right to a speedy trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Williams*, 475 Mich 245, 261; 716 NW2d 208 (2006). In order to determine whether a defendant has been denied a speedy trial, a court must weigh (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Id.* at 261-262.

LENGTH OF DELAY

When a delay is under 18 months, the defendant must show prejudice. *People v Waclawski*, 286 Mich App at 665. A delay that is more than 18 months is presumptively prejudicial, and the burden shifts to the prosecutor to show a lack of prejudice. *Id.* The time between defendant's arrest (October 29, 2009) and trial was about 21 months. However, the trial court dismissed the charges against defendant on September 9, 2010, and the prosecution did not recharge defendant until November 3, 2010, a time span of 63 days. Absent bad faith by the prosecutor, a delay is not "attributed to either side" when there is no charge pending against defendant. *People v Wickham*, 200 Mich App 106, 111; 503 NW2d 701 (1993). This is true even when the prosecution caused the dismissal by failing to prepare for trial. *Id.* Thus, for purposes of establishing the burden of proof, the delay between arrest and trial was approximately 19 months. Therefore, the prosecution had the burden to show that defendant was not prejudiced by the delay.

REASON FOR DELAY

This Court attributes each period of delay to either defendant or the prosecution, *Waclawski*, 286 Mich App at 666, though delays due to scheduling, docket congestion, and other delays inherent in the court system are attributed to the prosecution, but are assigned only minimal weight. *Id*.

The prosecution is responsible for the majority of the delay between arrest and trial. Most of these delays were caused by inherent delays in the court system, and are only given minimal weight. *Id.* However, the prosecution is responsible for an almost two-month delay, from September 9 to November 3, 2010, when it dismissed the charges because it was unprepared to go to trial. Not only is the prosecution charged with the delay between the original trial date and the recharging, but it is also charged with the time the proceedings had to be repeated after the recharging, which was an additional delay of approximately one month.

On the other hand, defendant was responsible for about five months of the delay between his arrest and trial. Before the prosecution dismissed the charges and recharged defendant, defendant filed a motion to quash the information that took a week to resolve. Then on December 15, 2010, defendant filed his motion to dismiss and declined to continue with pretrial proceedings until the court heard his motion. This took over two months to resolve. Defendant

is also responsible for a delay of about three months, from April 27, 2011, to the start of trial, when defendant filed, and the trial court granted, an emergency motion to adjourn the date of trial. Therefore, because both sides contributed fairly equally to the delays, this factor does not weigh in either party's favor.

ASSERTION OF RIGHT

This factor weighs slightly in defendant's favor. Defendant asserted his right to a speedy trial approximately seven and a half months before the trial court held his trial when he filed a motion for dismissal on December 15, 2010. See *Waclawski*, 286 Mich App at 668 (the defendant filed a speedy trial demand five months before trial, and the assertion of right factor weighed "only the slightest in defendant's favor").

PREJUDICE

The prosecution was able to overcome the presumption of prejudice. "There are two types of prejudice: prejudice to the person and prejudice to the defense." *Waclawski*, 286 Mich App at 668 (citations omitted). This Court takes prejudice to a defendant's defense more seriously because an inability to prepare his defense jeopardizes the fairness of the entire trial. *Id.* Here, defendant argues that one of his key witnesses died during the delay. However, as the prosecution correctly points out, defendant did not list that person on his witness list before the first trial. This factor favors the prosecution. After weighing the factors, defendant's argument that the trial court denied him his right to a speedy trial fails. The trial court correctly denied defendant's motion on this issue.

D. HEARSAY

As his final argument in challenge to his convictions, defendant argues that the trial court improperly allowed the prosecution to introduce inadmissible hearsay testimony. This Court reviews legal issues de novo, *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009), while we review a trial court's decision to admit evidence under the much more deferential abuse of discretion standard, *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). An abuse of discretion occurs when a trial court admits evidence that is inadmissible as a matter of law. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

As stated earlier, unpreserved evidentiary issues are reviewed for plain error affecting substantial rights. *People v Jordan*, 275 Mich App 659, 665; 739 NW2d 706 (2007). This Court will only reverse if the defendant is actually innocent or the conviction seriously affected the integrity, fairness, or public reputation of the judicial proceeding. *Id.* The defendant bears the burden to demonstrate the existence of plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

HEARSAY AND CONFRONTATION

"Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted." *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007), citing MRE 801(c). A defendant's constitutional right to confront the witnesses against him "bars the admission of testimonial statements by *a witness* who does not appear at trial unless the witness is unavailable

and the defendant had a prior opportunity to cross-examine the witness." *People v Dendel (On Second Remand)*, 289 Mich App 445, 453; 797 NW2d 645 (2010) (emphasis added).

Detective Ferguson's statement that the two eyewitnesses[10] said they saw defendant throw the gun and drugs from the balcony was not hearsay, as the prosecutor offered Detective Ferguson's testimony to explain why he did not send the gun to the laboratory for fingerprinting. As a result, the prosecution did not offer the statement for the purpose of establishing the truth of the matter asserted.

PROBATIVE VALUE

When a police officer testifies to the reason he took a subsequent action, "even if [his] testimony was offered for a purpose other than its truth, it must also be determined what the testimony tends to establish and whether that evidence is probative of a material issue in dispute." *People v McAllister*, 241 Mich App 466, 470; 616 NW2d 203 (2000), remanded in part on other grounds 465 Mich 884 (2001). Similarly, pursuant to MRE 403, the trial court may also exclude otherwise admissible evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *People v Blackston*, 481 Mich 451, 461; 751 NW2d 408 (2008), quoting MRE 403 (internal quotation marks omitted). "Unfair prejudice may exist where there is a danger that the evidence will be given undue or preemptive weight by the [trier of fact] or where it would be inequitable to allow use of the evidence." *Id.* at 462.

Detective Ferguson's statement was "probative of a material issue in dispute." *McAllister*, 241 Mich App at 470. Although a police officer's reasoning for taking an action is not always relevant to the determination of the case, see *People v Wilkins*, 408 Mich 69, 73; 288 NW2d 583 (1980), and *McAllister*, 241 Mich App at 470, here defendant implied that Detective Ferguson did not send the gun for fingerprint testing because the tests would not confirm defendant handled the gun. Thus, Detective Ferguson's reasoning for not testing the gun was a material issue in dispute.

Nor was the statement's probative value substantially outweighed by the danger of unfair prejudice or jury confusion. Defendant states that the jury believed, based on Detective Ferguson's testimony, that there was a third and possibly a fourth officer that saw defendant actually possess and throw the gun. However, the more probable conclusion for the jury to reach from these statements was that Detective Ferguson was referring to Sergeant Miles and Officer Fletemier, rather than two other unnamed eyewitnesses. This conclusion is further supported by Detective Ferguson's testimony that he assigned Sergeant Miles and Officer Fletemier to the rear of the building during the search.

[10] It is clear from the record that the witnesses Detective Ferguson was referring to were Sergeant Miles and Officer Fletemier. Both testified at trial, providing defendant with every opportunity to cross-examine them.

Having resolved all issues raised by defendant against him, we now turn to the prosecution's appeal of the order granting defendant a new trial.

III. NEW TRIAL

In Docket No. 318765, the prosecution challenges the trial court's decision to grant defendant a new trial on the basis of newly discovered evidence. The new evidence is evidence that Detective Ferguson lied in an affidavit filed in support of a request for a search warrant, in an unrelated case. Specifically, defendant alleges that Detective Ferguson stated in an affidavit that he had not opened a container (that contained narcotics) prior to seeking the search warrant, when in fact he had. We hold that the trial court abused its discretion in granting a new trial because this is not one of those rare cases where impeachment evidence on a collateral matter was sufficient to warrant a new trial.

"This Court reviews for an abuse of discretion a trial court's decision to grant or deny a motion for a new trial. An abuse of discretion occurs when the trial court renders a decision falling outside the range of principled decisions." *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012) (citations omitted). "A trial court's factual findings are reviewed for clear error." *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "[T]his Court reviews de novo whether a rule of evidence precludes admission of the evidence." *People v Powell*, 303 Mich App 271, 276; 842 NW2d 538 (2013).

Defendants imprisoned within the Department of Corrections are, quite naturally, some of the biggest advocates of motions for new trials based upon newly discovered evidence. The courts, however, are not so enamored with them. Indeed, for at least the last 85 years the Supreme Court has adhered to the proposition that "motions for a new trial on the ground of newly discovered evidence are looked upon with disfavor," *Webert v Maser*, 247 Mich 245, 246; 225 NW2d 635 (1929), as important principles of finality and due diligence (amongst others) are implicated by these motions, *Rao*, 491 Mich at 280. In *Cress*, 468 Mich at 692, the Supreme Court set forth the four-part test that must be met to warrant a new trial based upon newly discovered evidence:

> For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [Citations and internal quotation marks omitted.]

Motions for new trials based upon newly discovered impeachment evidence face an even more difficult hurdle. In *People v Grissom*, 492 Mich 296, 299-300; 821 NW2d 50 (2012), the Court held that newly discovered impeachment evidence relating solely to *collateral* matters *cannot* form the basis for a new trial, as the impeachment evidence must meet both the *Cress* test and be exculpatory:

> [I]mpeachment evidence may be grounds for a new trial if it satisfies the four-part test set forth in *People v Cress.* We further hold that a material, exculpatory

> connection must exist between the newly discovered evidence and significantly important evidence presented at trial. It may be of a general character and need not contradict specific testimony at trial. Also, the evidence must make a different result probable on retrial. [Citation omitted.]

The *Grissom* Court summed up its holding regarding the difficulty in bringing a successful motion for new trial based on newly discovered impeachment evidence:

> It bears emphasizing that, as this Court recognized more than a century ago, newly discovered impeachment evidence ordinarily will not justify the grant of a new trial. Our decision today, therefore, does not disturb this unremarkable statement. It will be the rare case in which (1) the necessary exculpatory connection exists between the heart of the witness's testimony at trial and the new impeachment evidence and (2) a different result is probable on retrial. But when that rare case presents itself, a court should not refuse to grant a new trial solely on the ground that the newly discovered evidence is impeachment evidence. It should not refuse even if the new evidence is not directly contradictory to specific trial testimony. [*Id*. at 317-318. Citation omitted.]

Although the *Grissom* Court stated that "newly discovered evidence that impeaches a witness's testimony with false statements made in other cases is expressly permitted," *id.* at 315, it also recognized that it will only be the "rare case" that meets both the exculpatory connection and the different result on retrial requirement. *Id*. at 317-318. See, also, *People v Armstrong*, 305 Mich App 230, ___; ___ NW2d ___ (2014); slip op at 7.

In the trial court the prosecution did not dispute that the first and third prongs of the *Cress* test were satisfied, and the trial court found that the evidence was newly discovered and defendant could not have, using reasonable diligence, discovered and produced the evidence at trial. See *Cress*, 468 Mich at 692. We will assume for purposes of this decision that the trial court was correct on these two *Cress* prongs. With regard to the second prong, the prosecution does not argue on appeal that the evidence would be cumulative and the trial court found that the evidence was not cumulative. *Id*. at 692.

The focus of our decision, then, is whether the impeachment evidence was exculpatory in nature, and if so, whether the evidence would make a different result probable on retrial. The proffered evidence was not general credibility evidence supporting an inference that Detective Ferguson had a tendency to lie. See *Grissom*, 492 Mich at 316. Rather, the evidence was of false statements and an omission made in obtaining a search warrant in another case involving illegal drugs. In that case, as in this case, Detective Ferguson's statements were used to establish probable cause. However, there is nothing exculpatory about this impeachment evidence. Acceptance of the veracity of the impeachment evidence would shed no light on whether defendant was the individual seen (tying their testimony together) by Officer Fletemier or Sergeant Miles throwing the gun and drugs off the porch of apartment 13, or to what these and other officers (in conjunction with Detective Ferguson) saw when searching apartment 13. Not only does the evidence itself have no exculpatory value, but even if its use caused the jury to disbelieve Ferguson's testimony, it would not be exculpatory because Ferguson never testified about defendant's actions that led to his convictions.

Just as importantly, "[u]nlike the evidence in those few cases in which we have ordered or allowed a retrial, the misconduct evidence does not directly support some alternate theory of the crimes, nor does it provide any legal justification for [Bryant's] actions." *United States v Robinson*, 627 F3d 941, 949 (CA 4, 2010). Instead, impeachment evidence such as this – misconduct by an officer in an unrelated case – "would do little to undermine the largely separate" witness testimony that provided the essential facts to convict defendant. *Id*. at 950.

DIFFERENT RESULT PROBABLE

For many of the same reasons, we likewise agree with the prosecution that admission of the impeachment evidence would not make a different result probable upon retrial because (1) the search revealed the items sought in the search warrant, and (2) the other officers' testimony supported defendant's convictions. As explained earlier, the *Grissom* Court recognized that "it will be the rare case in which impeaching evidence warrants a new trial, because ordinarily such evidence will cast doubt at most on the testimony of only one of the witnesses." *Grissom*, 492 Mich at 314, quoting *United States v Taglia*, 922 F2d 413, 415 (CA 7, 1991). The Seventh Circuit in *Taglia* additionally noted that:

> "[I]f the government's case rested entirely on the uncorroborated testimony of a single witness who was discovered after trial to be utterly unworthy of being believed because he *had lied consistently in a string of previous cases*, the district judge would have the power to grant a new trial in order to prevent an innocent person from being convicted." [*Grissom*, 492 Mich at 315, quoting *Taglia*, 922 F2d at 415 (emphasis added in *Grissom*).]

The newly discovered impeachment evidence offered by defendant is not sufficient to grant a new trial where the prosecution's case was supported by other witnesses. As we just noted, the trial testimony of Officer Fletemier and Sergeant Miles supported defendant's convictions. Their combined testimony established that defendant exited apartment 13, threw the gun and heroin over the balcony, and went over the wall to the balcony of apartment 15, as well as the weight of the heroin and cocaine found inside and outside the apartment. Defendant argues that the fact that the officers in the other case covered up for Detective Ferguson could lead the jury to disbelieve the other officers in this case. However, there is no evidence that other officers lied or covered for Detective Ferguson in the other case, or that any others did so in this case. Accordingly, the impeachment evidence regarding Detective Ferguson would not reasonably lead the trier of fact to disbelieve Officer Fletemier or Sergeant Miles in this case. See *United States v Souffrant*, 338 F3d 809, 823 (CA 7, 2003) (assertion that officer lied in a search warrant affidavit in another case not sufficient to grant new trial where defendant brought found no evidence to suggest officer lied in this case or that a affidavit contained any false or incorrect information). A different result would not be probable upon retrial.

The dissent does not disagree with this holding, but instead argues that defendant could use the impeachment evidence that Detective Ferguson made false statements to obtain a search warrant in another case to challenge the validity of the search warrant[11] in this case.

> "[W]here the defendant makes a substantial preliminary showing that a *false statement knowingly and intentionally, or with reckless disregard for the truth,* was included by the affiant in the warrant affidavit, *and if the allegedly false statement is necessary to the finding of probable cause*, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, *with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded* to the same extent as if probable cause was lacking on the face of the affidavit." [*People v Mullen*, 282 Mich App 19, 22; 762 NW2d 170 (2008), quoting *Franks v Delaware*, 438 US 154, 155-156; 98 S Ct 2674; 57 L Ed 2d 667 (1978) (emphasis added in *Mullen*).]

However, "[i]n Michigan, there is a presumption that an affidavit supporting a search warrant is valid." *Id.* at 23. The *Mullen* Court stated that "only when there have been *material* omissions *necessary to the finding of probable cause* may the resulting search warrant be invalidated." *Id.* at 24 (emphasis in original). "The defendant has the burden of showing, by a preponderance of the evidence, that the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to the finding of probable cause." *Waclawski*, 286 Mich App at 701.

Detective Ferguson testified that he was the affiant on the search warrant for apartment 13 and that he saw defendant at the location earlier on October 29, 2009, and the day before. But there was nothing presented by defendant (and the trial court allowed for some discovery) to suggest in the slightest that Detective Ferguson lied in the search warrant affidavit in this case. Defendant has not brought forward any evidence that the search warrant contained any falsehoods. Absent *any* such evidence, the "presumption of validity cannot be overcome by defendant's self-interested inferences and conclusionary statements" about Ferguson's potential to have lied in the affidavit because he had lied once before. *Souffrant*, 338 F3d at 823-824. In light of that,[12] and the remaining independent evidence against defendant, we do not have a real

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[11] There is a question, not raised by the prosecution, as to whether the court rule governing new trials, MCR 6.431(B), would be the appropriate vehicle to challenge the validity of a search warrant. The two grounds within that court rule seem to focus exclusively on what occurred during trial, not to what occurred in the preliminary steps to invoking the charges.

[12] There is also a significant question whether defendant would have standing to challenge the search warrant. Defendant testified that the apartment was that of an acquaintance. No evidence suggests that defendant resided overnight at the location, or otherwise had an ownership interest in the apartment. See *People v Parker*, 230 Mich App 337, 339-340; 584 NW2d 336 (1998).

concern that an innocent person was convicted. *United States v Costis*, 988 F2d 1355, 1360 (CA 4, 1993), citing *United States v Sanchez*, 969 F2d 1409, 1414 (CA 2, 1992).

We affirm defendant's convictions and sentences in Docket No. 306602, and reverse the trial court's order granting defendant a new trial in Docket No. 318765.

/s/ Christopher M. Murray
/s/ Mark T. Boonstra